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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

JUL 22 2011

DATE: OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a telecommunications consulting business that seeks to permanently employ the beneficiary as a software engineer (applications) and classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

The Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary. In particular, the Director determined that the petitioner did not demonstrate its ability to pay the proffered wage in the year 2005.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application (ETA Form 750) was accepted by the DOL on March 23, 2005. The form states that the "rate of pay" for the software engineer position is $75,000/year, and that the beneficiary began working for the petitioner in August 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is

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[1] An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree . . . ."

realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his Decision denying the petition on August 29, 2008, the Director found that the petitioner had not established its continuing ability to pay the proffered wage from the priority date up to the present. After indicating that the petitioner's business was not large enough for USCIS to rely on a letter from its president asserting that the petitioner had the ability to pay the proffered wage (see 8 C.F.R. § 204.5(g)(2)), the Director discussed three different ways the petitioner could establish its ability to pay: (1) if it already employs the beneficiary and has been paying him at a rate equal to or above the proffered wage; (2) if its annual net income is equal to or greater than the proffered wage; or (3) if its annual net current assets (defined as current assets minus current liabilities) are equal to or greater than the proffered wage. With respect to options (1) and (2), the Director found that the petitioner paid the beneficiary more than the proffered wage in 2007 and 2008, and that in 2006 the amount it paid the beneficiary (slightly below $75,000) combined with the petitioner's net income that year also exceeded the annual proffered wage. With respect to 2005, however, neither the compensation to the beneficiary, nor the petitioner's net income, nor both amounts combined, came even close to the proffered wage of $75,000/year. With respect to option (3), the Director found that the petitioner's net current assets were also vastly insufficient in 2005 to cover the proffered wage. Thus, the record failed to establish the petitioner's ability to pay the proffered wage in 2005.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On appeal counsel asserts that the petitioner's expenses for "sub-contractors or temporary workers" in 2005, as recorded on its federal income tax return (Form 1120) for that year, should be added back to net income because these expenses would be saved as temporary employees were replaced by permanent employees like the beneficiary. The petitioner's Form 1120 for 2005 lists "sub-contracting" expenses of $1,434,851 as a deduction on Line 26, Statement 1. Counsel claims that adding the foregoing figure to the petitioner's meager net income in 2005 ($658) would provide more than ample resources for the petitioner to pay the full proffered wage to the beneficiary. Counsel's logic is faulty, however, because the petitioner already employed the beneficiary full-time in 2005. The beneficiary did not replace any of the "temporary sub-contractors" to whom the petitioner paid over $1.4 million in 2005. Rather, he was employed in addition to the sub-contractors. Accordingly, counsel's argument on appeal does not demonstrate the petitioner's ability to pay the proffered wage in 2005.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, the AAO first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the beneficiary's Form W-2, Wage and Tax Statement, for 2005 shows that his gross pay that year was $20,392.75. Since that figure is well below the annual salary of the software engineer position ($75,000), the petitioner cannot establish its ability to pay the proffered wage through its actual compensation to the beneficiary in 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, the AAO examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding

> depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income. As shown in the petitioner's federal income tax return for 2005, its net income (line 28 of Form 1120) was $658.00 that year. Since this figure was far below the proffered wage of $75,000/year, the petitioner cannot establish its ability to pay in 2005 based on its net income.

As yet another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax return. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

In this case, however, the petitioner's federal income tax return for 2005 shows net current assets of only $4,119 (comprised of $6,769 in cash minus $2,650 in "other current liabilities"), which was far below the proffered wage of $75,000/year. Accordingly, the petitioner cannot establish its ability to pay the proffered wage in 2005 based on its net current assets.

Thus, the petitioner has not established its ability to pay the beneficiary the proffered wage in 2005 by means of wages actually paid to the beneficiary, its net income, or its net current assets that year.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses,

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[3]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner's business was founded in 1990, but still had just eight employees at the time the instant petition was filed in December 2007. The federal income tax returns in the record show that the petitioner's gross receipts were $2,115,150 in 2005, rose to $2,663,816 in 2006, and dropped back to $2,140,347 in 2007. During those three years its net income was negligible – totaling just $658 in 2005, $1,264 in 2006, and $1,058 in 2007. Thus, the petitioner's last three years of operation prior to the instant proceeding do not indicate that the business was on a steady path of growth. In fact, gross receipts declined by 20% (more than $500,000) from 2006 to 2007.

In view of the foregoing factors, the AAO concludes that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage for the software engineer position in 2005.

For all of the reasons discussed herein, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage to the beneficiary from the priority date up to the present. Accordingly, the petition cannot be approved.

Beyond the decision of the Director, the record does not establish that the beneficiary had the requisite five years of experience on the priority date (March 23, 2005), in conformance with the terms of the labor certification. The Form ETA 750 states that five years of experience in the "job offered" or in a related occupation – specifically, computer software development and/or consulting – was required to perform the duties of the software engineer (applications). On the labor certification the beneficiary listed the following jobs between June 1998 and March 2005:

- June 1998 to June 2000 – software consultant with [redacted] in Ottawa, Canada.
- July 2000 to November 2002 – software developer with [redacted] in Red Bank, New Jersey.
- January 2003 to August 2004 – software consultant with [redacted] in Vancouver, British Columbia.
- August 2004 to the present (March 2005) – software engineer (applications) with [redacted] (the petitioner) in Ocean, New Jersey.

As evidence of the beneficiary's employment during the foregoing time period, the petitioner submitted copies of the following documentation:

- A letter from the president of [redacted], dated November 19, 2004, stating that the beneficiary was employed as a computer software programmer from June 1998 to June 2000.
- A letter from a technical manager of [redacted], New Jersey, dated December 3, 2004, stating that the beneficiary was employed as a software developer from July 31, 2000 to November 22, 2002, and was "rehired" in the same capacity on August 16, 2004.
- A letter from the manager of [redacted] in Vancouver, British Columbia, dated December 14, 2007, stating that the beneficiary "from [redacted]" provided consulting services from January 2003 to August 2004.

While the first employment letter above is consistent with the first job listed on the Form ETA 750, the second and third employment letters are not in synch with any of the jobs listed on the labor certification between 2000 and 2005. It may be that the beneficiary was outsourced by [redacted] from 2000 to 2002, as he appears to have been by [redacted] to [redacted] from 2003 to 2004, and by the petitioner [redacted] to [redacted] in 2004. If that was the case, then the letters from [redacted] and [redacted] are not from former employers of the beneficiary, but rather from contractors of his services, and as such would not be acceptable evidence of the beneficiary's experience as a software developer and software consultant during the years 2000-2004. The regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) specify that letters attesting to a beneficiary's qualifying experience must be from "employers" past or present.

Since the letter from [redacted]. appears to be the only one from a former employer of the beneficiary, the record lacks documentary proof that the beneficiary completed five years of experience in the "job offered" or in a related occupation before the priority date of March 23, 2005. For this reason as well, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.